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No. 88-1157

IN THE
Supreme Court of the United States
October Term, 1988

MARTIN MARIETTA CORPORATION,

Petitioner,

v.

WILLIAM C. POLLARD,

Respondent.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court extend the rule of *Upjohn Company v. United States,* 449 U.S. 383 (1981), for a special class of corporate defense contractors who secure lenient treatment for themselves by offering up a former employee to the Government as a "bad apple" responsible for alleged past transgressions of defense procurement regulations, by permitting such corporations, not only to assert the attorney-client privilege and the work product protection for discussions between attorneys and any employees of the firm regardless of their management authority, but thereafter to selectively disclose to the Prosecution, the Department of Defense and the Grand Jury, privileged and protected materials deemed favorable to the corporation's position, while maintaining the privilege and protection as a basis to deny the indicted former employee factual materials on the same subject matter which are material to his defense?

2. Where a defendant in a criminal case establishes that materials sought by a subpoena from a third party corporation are relevant, admissible, and specifically designated, can that third party corporation's claim of work product protection constitute grounds for failure to enforce the subpoena consistent with the defendant's Sixth Amendment right to compulsory process, after that corporation pleads guilty to charges stemming from the investigation which gave rise to the preparation of the materials at issue?

3. Does the limited protection afforded work product materials rise to the dignity of an evidentiary privilege recognized by the common law, the Constitution, statute, or court rule, within the meaning of Fed. R. Evid. 501, so as to deny a defendant in a criminal case access to specifically designated, relevant and admissible documents which are material to his defense at trial?

4. In applying the work product doctrine within its

own terms, what, if anything, more should be required to establish good cause for enforcing a subpoena for materials arguably covered by the work product doctrine beyond a showing that the subpoena meets the requirements of Fed. R. Crim. P. 17(c)?

5. Does the work product doctrine apply where the activities of counsel are material issues in a criminal trial, both to the Government's theory of conspiracy and fraud and to the defendant's proof that he was falsely offered up as a scapegoat by his former employer in an effort to secure lenient treatment for itself and to avoid implicating high level company officials?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a contempt citation in connection with a criminal case, *United States v. Pollard*, Crim. No. Y-87-0142 (D.Md. [Pending Trial]). Martin Marietta Corporation was held in contempt for failing to produce materials subpoenaed by the defense after being ordered by the District Court to do so. William C. Pollard is the defendant in the underlying criminal case and the party seeking enforcement of the subpoena. The United States was a party to the proceedings below, but did not file a brief.[1]/

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[1]/ The Government sought an order from the Court of Appeals giving it permission to disclose to Pollard the contents of a position paper submitted to it by Martin Marietta. The Court of Appeals declined to render what it considered to be an advisory opinion. (Pet. App. 15a n. 3).

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MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, William C. Pollard, files this memorandum in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to apprise this Court of matters material to its determination of whether to commit its limited resources to this case.

OPINIONS BELOW

Respondent has no objection to the recitation of the Opinions Below contained in the Petition.

JURISDICTION

Respondent has no objection to the Statement of Jurisdiction contained in the Petition.

STATEMENT OF THE CASE

Petitioner's Statement of the Case omits facts which are critical to the evaluation of the decision below. Respondent's Cross-Petition for a Writ of Certiorari, filed in Case Number 88-1338, explains the general background of the underlying criminal proceeding against the respondent and the contempt citation that was issued against Petitioner. Here, respondent will focus on the most critical omissions from the Petition --(1) the nature of the knowing disclosures by Petitioner to the Government and the Grand Jury and the resulting agreement to give Martin Marietta lenient treatment; and (2) the relationship between the alleged internal investigation by Martin Marietta and the transactions at issue in the underlying criminal case.

Martin Marietta Waived Confidentiality

The Petition describes a situation where an attorney decides to "refer to his client's statements, and the conclusions of his own investigative activities as to the existence or absence of evidence to support his opponent's theories" (Petition at 2) and "counsel's report of verbatim statements by one Company employee . . ." (Petition 3-4).

The first point in need of clarification is that on at least one occasion we know that the disclosure went beyond mere argumentation of counsel. At that time, Martin Marietta disclosed not merely a synopsis of what a witness might say -- it took a statement made by one of its employees who will be a key witness against Respondent, as to which it asserts attorney-client privilege and work product protection, and it disclosed (1) the exact words the witness said; (2) the identity of the witness; and (3) the circumstances surrounding the statement including the questions to which he was responding. (Cross Pet. App. 61a-62a).

The second point in need of clarification is that, while the record suggests that there were other disclosures to the Government, it fails to illuminate what the extent of these other disclosures was. The District Court's memorandum opinion refers to the transcript of the January 31, 1985 interview with Company employee and witness Westfall as an "example" of the disclosures made to the Government of verbatim statements. (Pet. App. 32a). The memorandum was based upon an *in camera* review of the documents at issue which were neither included in the record nor made available to Pollard's counsel.

The record concerning the extent of disclosures made to the Government, other than the observations made by the trial judge after his *in camera* review, consists of representations by Martin Marietta which are hardly consistent, even as to the number of times that the Company disclosed allegedly privileged materials. In the proceedings below, Martin Marietta initially took the position that there was only one paper submitted to the office of the United States Attorney for the District of Maryland ("U.S. Attorney") which referred to lawyer-client communications. (Cross Pet. App. 50a). Sometime later, Martin Marietta revealed to the District Court that a further disclosure had been made to the Department of Defense ("DoD"), but the Company denied that either disclosure to the DoD or the U.S. Attorney revealed actual statements by any witness. (Cross Pet. App. 51a-54a). The Petition for a Writ of Certiorari shows yet another disclosure made in the form of a supplement to the initial paper submitted to the U.S. Attorney in November 1986. (Petition at 4).

The third point to be made concerning the extent of disclosures by Martin Marietta of allegedly privileged matter is that the Company made available to the Government, to testify against Pollard before the Grand Jury, witnesses who participated in the alleged internal investigation conducted by its legal staff upon which is based the privilege claims. These witnesses testified about confidential information furnished to

them by Martin Marietta employees in the very investigation which is in question. (Cross Petition at 8-9 n. 4, 11-12 n. 5). The Grand Jury transcript was not made part of the record below, although it was proffered to the Trial Court which was made aware that Pollard was relying upon it as a further basis of waiver.[2]

Finally, Pollard must take issue with Martin Marietta's characterization of these disclosures as part of the unsuccessful effort of its counsel to "persuade the United States Attorney not to bring criminal charges." (Petition at 3-4). While it is certainly true that Martin Marietta ultimately agreed to plead guilty to a three-count felony information (Petition at 4), the Petition omits the agreement which was reached with DoD whereby Martin Marietta was permitted to continue to do business as a Government contractor. The agreement with the U.S. Attorney was contemplated by the earlier agreement with the DoD, and it was executed only after the DoD agreement was reached. In contrast to the nominal fine that Martin Marietta paid in connection with its guilty plea in the criminal proceeding, it agreed to pay $4.3 million as part of the so-called "Administrative Settlement" with DoD for what Pollard contends was basically blackmail. A further provision of that agreement required Martin Marietta to discontinue the funding of Pollard's defense, although it was permitted to continue the funding of separate counsel for any other Martin Marietta employees that might come under investigation and to keep them on the Company payroll. (Cross Pet. App. 58a-60a).

From Pollard's viewpoint, all of the disclosures made to the Government were the result of a knowing and informed

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[2] Transcript of Motion Hearing, November 13, 1987 at 14-15. As Pollard's counsel observed, the grand jury transcripts were available to the Trial Court, since they were taken in the same District. If this Court grants certiorari, Pollard will seek to maintain the confidentiality of the grand jury transcripts under Fed. R. Crim. P. 6 by filing them for *in camera* review.

business decision by Martin Marietta, made with the advice and recommendation of its counsel, to offer up Pollard to the DoD and the U.S. Attorney as a scapegoat for the following purposes: (1) to enable Martin Marietta to continue doing business with the Government and thereby assure its very survival; and (2) to shift the Government's attention away from higher level corporate officials by offering Pollard as the sole culprit around whom the Company could define a damage control area.

The Transactions At Issue Include the Alleged Investigation

The Petition gives the reader the impression that the documents at issue were created as part of a legal investigation which was distinct from the transactions underlying the criminal case against Pollard. (Petition at 2-3). Thus, the Petition states that beginning in October, 1984, "Martin Marietta's General Counsel" was attempting "to learn the facts necessary to provide legal advice to Martin Marietta's senior management and to prepare for litigation." (Ibid).

The petition does not say much about the transactions at issue in the underlying criminal case, other than to allude that they are somehow the nefarious doings of Mr. Pollard. As shown in the Cross-Petition, the transactions at issue concern a travel project which enabled Martin Marietta to save on travel costs implemented through a so-called "Four Box Model" created by the office of the same Martin Marietta General Counsel who allegedly initiated the legal investigation. (Cross-Petition 4-7). Although the Petition implies that Martin Marietta's General Counsel first became personally involved by initiating a legal investigation in October of 1984 (Petition at 2), his personal involvement actually goes back at least to the preceding Spring when he allegedly attempted to throw newspaper columnist Jack Anderson off the scent of an investigative report of alleged wrongdoing in connection with the travel project and the Four Box Model. (Cross-Petition at 7).

The underlying charge now pending against Pollard is essentially that he indirectly defrauded DoD by obstructing an internal audit of Martin Marietta and its travel subsidiary. As the Court of Appeals explained, Pollard never had direct contact with DoD. (Pet. App. 5a). But while the audit is part and parcel of the transactions at issue in the underlying case, in the proceedings below Martin Marietta asserted that it was part of the legal investigation which formed the basis of its claim for asserting attorney-client privilege and work product protection. (Cross Pet. App. 56a-57a). Although Martin Marietta attempted to argue that the auditors were working for the legal investigation after October 8, 1984 (Ibid), they testified before the Grand Jury about information they learned well after that date in the course of their investigation. (See Cross Petition at 11-12 n. 5). While Martin Marietta attempts to draw a line after October 8, 1984, the indictment alleges a conspiracy enduring at least until the time that Pollard left Martin Marietta in November of 1984. (Cross Pet. App. 38a).

REASONS FOR DENYING THE WRIT

The members of this Court are far better equipped than Pollard to weigh the relative importance of this case against the many other pending appeals and petitions for certiorari which call upon its limited resources. But in order for this Court to make an informed decision, the Court must be apprised that the case is much more complex than appears from the face of the Petition.

Although the case below was resolved to the satisfaction of the District Court and the Court of Appeals on the basis of the waiver doctrine, this is only but one of many hurdles that Martin Marietta must overcome to establish its claim that the materials at issue should not be released to respondent Pollard for use in his defense of the criminal charges against him because they are allegedly covered by the attorney-client privilege and the limited protection of work product materials. Part I, below, explains that the ultimate issue of what should

be privileged is in the first instance a factual question unique to the circumstances of this case. Beyond this, for the Court to even consider Martin Marietta's claim that some of the materials at issue are covered by the limited protection afforded work product materials, it must determine whether the work product doctrine should be applied as an evidentiary privilege so as to deny a defendant in a criminal case access to documents which are material to his defense. Issues 2 through 5 in the Questions Presented for Review in this Memorandum are identical to the Questions presented in the Pollard's Cross-Petition.

Part II, below, examines the questions presented for review by Martin Marietta's Petition. Contrary to Petitioner's protestations, the Courts below applied the longstanding principle that the holder of an evidentiary privilege cannot selectively reveal information covered by the privilege where it is deemed beneficial to himself, and then claim the benefit of the privilege to withhold other information on the same subject matter. As the Petition itself alludes, a narrow reading of the waiver doctrine tends to broaden the scope on an evidentiary privilege. (Petition at 16). What is really at issue is that, after securing the broadest application of privilege in *Upjohn Company v. United States,* 449 U.S. 383 (1981), by extending the attorney-client privilege to communications between counsel and all corporate employees regardless of their management responsibility, Martin Marietta wants to be relieved of the corresponding responsibility to keep the privileged information confidential. For this Court to endorse any such effort would allow corporate privilege holders, such as Martin Marietta, to falsely accuse former employees of sole responsibility for past transgressions as a means of relieving current officials from responsibility without revealing the basis for the accusations that they make. See STRASSER, CORPORATE PROBE USE EXPANDING, The National Law Journal, January 9, 1989, p. 1. Nothing in *Upjohn* suggests such an unfair result, and the Court need not burden itself by considering Martin Marietta's proposal further.

I. Martin Marietta Has Failed to Build A Factual Record to Support Its Claim of Limited Waiver or Even To Show that the Documents at Issue Are Protected From Disclosure in the First Instance.

In order for this Court to resolve the extent of any evidentiary privilege claimed by Martin Marietta, it will be necessary to draw at least three important distinctions which are very difficult to make on the current state of the record. The first, and most obvious from the Petition, is the distinction that Martin Marietta must have the Court draw between matters which were disclosed to the U.S. Attorney, the DoD, or the Grand Jury, and matters which allegedly remained confidential. Unfortunately, the record is extremely murky on this, largely as a result of the inconsistency in the positions the Company took in the proceedings below on even as to how many times the Company revealed witness statements to the Government.

Two more factual distinctions must be made in order to determine what was and what was not privileged in the first place. According to Martin Marietta, the documents at issue are covered by the attorney-client privilege and the limited work product protection because they were created as part of a legal investigation. Most companies in Martin Marietta's position would have entrusted such an investigation to outside counsel at the outset, if for no other reason than to draw a clear line of demarcation between the investigation itself and any activities that may have preceded it. But in a situation where the crime charged is essentially that of misleading company auditors, Martin Marietta utilized the same auditors in its so-called legal investigation, and entrusted the investigation to the same General Counsel who supervised the lawyers who created the transactions at issue, and who earlier had been personally involved in an effort to throw an investigative reporter off the trail, which some might regard as a cover-up.

(See Cross Petition at 7-8). [3] As a result of these decisions, and the lack of any effort on Martin Marrietta's part to demarcate the starting point of its alleged legal investigation [4], it is now extremely difficult to distinguish the fruits of a legal investigation which are arguably protected, from nonprivileged accounting functions conducted in the ordinary course of business. It is likewise difficult to distinguish the investigation allegedly conducted for the purpose of representation and advice to the corporation, from the activities of the General Counsel's office in setting up the transactions at issue in the underlying case and later allegedly covering up those transactions. [5]

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[3] Although outside counsel were subsequently retained, Martin Marietta's General Counsel, Frank H. Menaker, Jr., apparently continues to supervise their efforts to this day. For example, he continues to appear "of counsel" on Martin Marietta's filings in this Court.

[4] Thus, Vice President of Auditing David Clous' Grand Jury testimony was to the effect that he was directing the investigation even after he was drafted by Menaker's legal investigative team (Cross Petition at 8-9 n. 4), while his affidavit asserts that Menaker directed it. (Cross Pet. App. 56a-57a).

[5] According to the indictment, the conspiracy to defraud the United States continued through November of 1984, well after the alleged legal investigation began. Although the indictment does not identify acts of counsel among the overt acts alleged in the indictment, a press release by the U.S. Attorney and the Statement of Facts submitted to the Court in support of Martin Marietta's guilty plea asserts that members of senior management had reason to question what was going on or failed to supervise what was going on. According to the U.S. Attorney's press release and Statement of Facts, three Martin Marietta vice-presidents attended a meeting in October of 1984 where allegedly incomplete information was given to the Government. (App. 4a, 7a). Since Pollard did not attend that meeting, at least one avenue of defense that needs to be explored is the ultimate

(continued...)

In addition to these factual questions, ultimately it will be necessary to resolve the question of whether the limited protection for work product materials should be afforded the status of a full evidentiary privilege, so as to deny a defendant in a criminal case access to documents shown to be specifically designated, relevant and admissible under the criteria of Fed. R. Crim. P. 17(c). It was not necessary for the District Court to deal with this matter because it determined that privilege and protection had been waived as to all of the documents involved. Because the Court of Appeals ruled that some of the materials should be protected from disclosure on the basis of work product protection, these questions are the subject of Pollard's Cross-Petition filed in Case No. 88-1338. The Cross Petition shows that the Court of Appeals extended the work product doctrine in violation of the Sixth Amendment and Fed. R. Evid. 501. Although Pollard sees no need to repeat here everything in the Cross Petition, the Court should understand that the issue will need to be addressed if certiorari is granted.

II. Martin Marietta Has Advanced No Justification to Extend *Upjohn*.

Martin Marietta primarily argues that the rulings below conflict with *Upjohn*, in that this Court determined to give the attorney-client privilege a broad sweep. As Martin Marietta acknowledges (Petition at 15, n. 10), the *Upjohn* Court did not directly address the issues of waiver and scope of waiver. The issue in *Upjohn* was whether the communications between lower level employees and corporate attorneys were privileged in the first instance. The Court rejected the control group test

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[5](...continued)
source of those misrepresentations. According to the Statement of Facts, Martin-Marietta vice-presidents were advised by counsel of the nature of the Four Box Model and were told of the profit potential for Maxim which the Government considers extraordinary. (App. 3a, 7a).

adopted by some lower federal courts, on the grounds that it tended to discourage "the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." 449 U.S. at 392. While *Upjohn* defined the zone of privacy afforded attorney-client communications to include lower level employees of a corporate client, it nonetheless did so only with respect to persons acting in the course of a confidential relationship with the client.

Martin Marietta urges in its petition that *Upjohn* did not go far enough. Thus, it asserts the need for special protection in order to engage in "frank discussions with opposing counsel in an attempt to settle cases." (Petition at 7). Such considerations have very little to do with the privacy of communication between lawyer and client. What Martin Marietta is attempting to do here is to extend the zone of privacy to those having an adversary interest to the client, by allowing the client to selectively disclose to its adversaries those portions of confidential communications deemed favorable to its own position while secreting the remainder. Thus, Martin Marietta criticizes Upjohn's treatment of the waiver issue on the basis of a commentary. (Petition at 15 n. 10). That commentary sets forth the issue more candidly than does Martin Marietta, as the creation of a new evidentiary privilege for "self-critical analysis." CRISMAN & MATHEWS, LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE IN INTERNAL CORPORATE INVESTIGATIONS: AN EMERGING CORPORATE "SELF-EVALUATIVE" PRIVILEGE, 21 Am. Crim. L. Rev. 123, 171-72 (1983).

The voluntary disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege. *In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 45 (S.D.N.Y. 1973); *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); C. MCCORMICK, EVIDENCE §§ 93, 97 (1954). The privilege of secret communication between lawyer and client has resulted from a

time tested balancing of the value of confidentiality against the hindrance to the search for truth which it necessarily implies; the privilege is intended only as an incidental means of defense, and not as an independent means of attack. WIGMORE, TREATISE ON THE LAW OF EVIDENCE § 2327. Thus, to allow corporations to utilize allegedly privileged materials [6] to point a finger of blame at an individual, and then to retain their claim of privilege as to information they choose not to reveal, tends to upset the traditional balance.

Crisman & Mathews's analysis demonstrates that there is very little new in the approach taken below to the waiver issue. Thus, they characterize the "strict" application of waiver principles as the "traditional approach". *Crisman & Mathews, supra,* 21 Am. Crim. L. Rev. at 127. Faced with the rise in corporate accountability over the last several years, principally in the burgeoning Securities and Exchange Commission Enforcement Program, they state that a minority of lower courts have adopted a limited waiver theory for self-investigations in order to alleviate the harsh effect of strictly applying of the waiver doctrine in cases of disclosures compelled in a regulatory environment, and also to encourage corporate self-evaluation. *Crisman & Mathews, supra,* 21 Am. Crim. L. Rev. at 126, 131-33. These commentators state that "altering the traditional privileges and strict waiver principles may be the wrong approach." *Crisman & Mathews, supra,* 21 Am Crim. L. Rev. at 127. They urge consideration by Congress of legislation to carefully tailor a distinct privilege for corporate self-evaluations in the place of stretching traditional attorney-client and work product privileges far beyond their

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[6] As shown in the Statement of the Case, the record suggests that Martin Marietta's disclosures and testimony to the U.S. Attorney, the DoD, and the Grand Jury went well beyond argument of counsel or even a discussion of the conclusions drawn by an investigation. In at least one instance, verbatim statements were revealed as to which Martin Marietta continues to assert privilege.

traditional rationale. Ibid. 7/

Whatever the merits of the *Crisman & Mathews* proposal, or the minority view extending the traditional attorney-client privilege and work-product doctrine through a limited waiver principle, this case presents a poor vehicle for their consideration by this Court. Contrary to Martin Marietta's protestations (Petition at 13-14), Pollard is not some third party who seeks to profit from the fact that disclosures of privileged materials were made to a Government agency. Pollard was the target of an intentional effort by Martin Marietta to minimize the impact of the Government's charges against itself by assigning sole responsibility for the transactions at issue to Pollard. The Government's case against Pollard was put together by Martin Marietta and is largely based upon allegedly privileged and protected information that Martin Marietta gleaned and supplied. It is nothing but sophistry for Martin Marietta now to argue that no testimonial use of the disclosures was made against Pollard. (Ibid). But for Martin Marietta's disclosures, it is highly unlikely that the Government would have indicted Pollard. The prosecution is now armed with statements by witnesses that have effectively locked in their testimony before the Grand Jury and will likely strongly influence the testimony that the witnesses will give at trial against Pollard. Considerations of fairness require application of the waiver doctrine regardless of whether a client uses a privileged statement in testimony directly against an adversary or whether he makes the statement available to someone else to use.

Martin-Marietta's policy arguments concerning furtherance

7/ The *Crisman & Mathews* proposal would afford a limited "self-evaluative" privilege for materials gathered in a corporate internal investigation, regardless of whether the inquiry was conducted by attorneys, accountants, investigators or other inside or outside agents or consultants. Although a Government agency itself would be allowed to make free use of materials disclosed to it, the materials would be protected from disclosure to competitors and other adversaries of the corporation. 21 Am. Crim. L. Rev. at 175-76.

of settlement discussions (Petition at 12-13 & n. 6) are also misplaced in this case. Although the Rules afford some protection for plea bargaining between a defendant and the prosecution, the expectation of confidentiality terminates once the defendant enters a plea of guilty, as Martin Marietta did in this case. Fed. R. Crim. P. 11(e)(6).

If the Court wishes to consider the adoption of either the *Crisman & Mathews* proposal or the minority rule on limited waiver, there will be many corporate litigants [8]/ who will offer much more compelling arguments than Martin Marietta will be able to make on this record. The Securities and Exchange Commission is not likely to abate its enforcement program any time soon. Unlike Martin Marietta, there are sure to be many corporate litigants who will be in a position to argue that disclosures made to that agency were not intended to implicate others. Martin Marietta's disclosures to the U.S. Attorney, the DoD and the Grand Jury were not the result of any regulatory requirement unique to corporations. These disclosures were simply the efforts of a target in a criminal case to secure

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[8]/ Martin Marietta's suggestion that the issue may escape meaningful review if the Court does not grant certiorari in this particular case (Petition at 22-24) is absurd. Full application of the waiver principle is the established traditional rule. Martin Marietta waived its privilege on the basis of advice of counsel who were well aware at the time that in the Fourth Circuit, at least, there is no limited waiver of privilege. *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984). Martin Marietta made a decision to waive privilege based upon sound business reasons, and given the choice of cooperation with the Government or facing debarment proceedings would likely make the same choice again. Future litigants are free to follow Martin Marietta's path if they have the courage of their convictions. While it is certainly true that the expense of litigation would need to be weighed against the likelihood of success (Petition at 24), the argument that reasonable corporate executives in the future having the financial resources to litigate would choose not to do so can only demonstrate (1) the underlying lack of merit in Martin Marietta's position; or (2) the lack of substantial prejudice from the viewpoint of corporate executives required to operate within the rule applied by the courts below.

lenient treatment for itself by implicating someone else so that it could continue doing business with the Government.

If the Court adopts Martin Marietta's proposal on the facts of this case, there would be no logical basis to limit the rule to publicly traded companies regulated by a Government agency, and it will be extremely difficult to limit its application in cases where other elements of organized crime, drug dealers or terrorists adopt the corporate form. On the other hand, if the Court were to rule against Martin Marietta's position it would likely limit its holding to the facts presented, which will only necessitate revisiting the issue again on a more compelling case brought by a corporate entity who makes disclosures to a Government agency which are not at the expense of the party seeking further disclosure.

CONCLUSION

Martin Marietta's Petition for a Writ of Certiorari should be denied. If the Court determines to grant that Petition, it should grant Pollard's Cross Petition filed in Case No 88-1338 to fully and fairly consider the issues presented by the case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :
v. : Crim. No. Y-87-053
MARTIN MARIETTA CORPORATION:

STATEMENT OF FACTS

Martin Marietta Corporation ("MMC") is a publicly-held company having its headquarters at 6801 Rockledge Drive, Bethesda, Maryland. MMC is engaged in the business of the development, manufacture and sale of systems and products in the aerospace and defense fields to the Department of Defense, as well as to various other branches of the federal government.

In 1982, MMC organized a committee to study how company travel could best be managed in view of the large yearly volume of travel by MMC employees. The committee decided to contract with a travel agency which could handle travel arrangements for the various MMC divisions. In response to MMC's request for proposal, various agencies offered to perform the travel function; several of the proposals promised to rebate to MMC a substantial portion of the commissions attributable to the company's business which the agency wold receive from airlines, rental car companies, and hotels.

MMC chose IVI Travel, Inc., a company based outside Chicago, to manage their travel. The selection of IVI was based on its ability to provide the services needed by MMC and on its offer to provide MMC a cash rebate.

Under the applicable Department of Defense regulations,

a contractor must credit to the government, either as a cost reduction or by cash refund, the applicable portion of any rebate relating to an allowable cost which it receives. Thus, if an MMC employee's travel was charged to a government contract and MMC received a rebate attributable to that travel, the government would be entitled to a credit or refund in the amount of the rebate.

MMC decided to devise an arrangement whereby it could keep the money proffered by IVI attributable to government travel instead of passing it through to the government. In the fall of 1982, various MMC employees proposed a plan which they called the "four box model." Under this plan MMC and IVI would each set up a subsidiary company. Performance Travel, Inc., the IVI subsidiary, would provided travel services to MMC. It would recover its costs from the commission fees paid by the airlines, rental car companies, and hotels. Maxim, the MMC subsidiary, would provide consulting services to IVI Travel. IVI would keep as a management fee 1% of gross travel revenues booked by PTI for MMC; the remaining commissions less the PTI operating costs would be available to Maxim. The MMC plan was that bona fide services had to be performed by Maxim before it could receive money from IVI. All profit realized by Maxim would go to MMC.

MMC and IVI established their respective subsidiaries in December, 1982. Thereafter, MMC employees prepared two contracts, one between MMC and PTI for travel services, and the other between Maxim and IVI for consulting services. Omitted from these contracts was the understanding that IVI would, after taking its management fee, make all of PTI's profits available to Maxim. Moreover, neither contract referenced the other nor gave any indication of a relationship between the money IVI would use to purchase services from Maxim and the commissions received by PTI on travel arrangements purchased by MMC. The two contracts, each for a one-year term, were executed on January 25, 1983.

During 1983, the volume of MMC travel handled through PTI/IVI increased as PTI opened offices at the various MMC locations. Monies were paid by IVI to Maxim for services performed in connection with setting up the PTI offices which provided travel assistance to MMC, and as reimbursement for Maxim employees working for PTI on MMC travel.

In October, 1983, Maxim employees, mindful of a status review meeting with several MMC vice presidents which was scheduled for November, solicited a $100,000 payment from IVI; those monies were available from the accumulated profits of PTI. The $100,000 served to improve the appearance of Maxim's books, and ultimately permitted it to show a $12,000 profit for 1983.

At the meeting in November, Maxim staff, including its president and general manager, presented to four MMC vice presidents the results of their 1983 operations and their projections for 1984. The projected profits of $1.1 million on revenues of $1.69 million. No question was raised at this meeting as to how Maxim was able to project $1.1 million in profits based on revenues of $1.69 million.

On January 27, 1984, he original contracts were renewed for another on-year term. The renewed MMC/PTI contract was executed by a vice president of MMC, and the renewed Maxim/IVI contract was signed by the president of Maxim.

In connection with a formal meeting for the Board of Directors of MMC in early 1984, a question was raised about Maxim Group, Inc. As a result of this inquiry, an internal memorandum was prepared and circulated to an MMC vice president which described the Maxim-IVI/MMC-PTI relationship as "very imaginative in getting around the rebate restrictions" and said "DCAA might dislike it."

IN April, 1984, Maxim proposed and IVI agreed to change the reimbursement rate for Maxim employees on loan to PTI from three times their salaries to five times their salaries. This was necessary to keep the monthly amount attributable to this function paid by IVI to Maxim at about $20,000 since the number of loaned employees has dropped.

Due to an expanding volume of travel by MMC which was booked through PTI, PTI's profits increased substantially in 1984. Maxim demanded and received from IVI increasingly larger amounts of money attributable to MMC travel without regard to the provision of services. Under applicable government regulations, these funds constituted rebates on travel billed in large part to the government.

MMC did not account to DOD for these rebates until late in 1984. Instead, during the summer of 1984, Maxim employees prepared false documents in an attempt to show that these monies had been earned by Maxim. On July 23, 1984, and again on August 29, 1984, the mails were used to transmit the documents which were designed to make it appear that Maxim had earned money from IVI by performing services, when in fact no services had been performed.

In October 1984, a report in the press, based on the internal MMC memorandum, revealed the Maxim-IVI/MMC-PTI relationship. Based on this and other information, representatives of the Defense Contract Audit Agency met with various MMC officials. DCAA sought access to MMC records in order to determine whether any credits or payments were due to the government as a result of this arrangement. At a meeting held on October 18, 1984 and attended by three MMC vice presidents, DCAA was provided with information regarding the performance of Maxim which DCAA later came to believe was incomplete.

Following the conclusion of the company's internal

investigation, it credited all Maxim net revenues for 1984 to its overhead pools, thus reducing costs charged to the government. This actions was accomplished prior to submission to he government of the company's overhead claim for 1984.

The overhead claim for 1983 was submitted to the Department of Defense on May 21, 1984. That claim was false in that it failed to account for rebate monies received as a result of travel attributable to government contracts.

/s
Breckinridge L. Willcox
United States Attorney

/s
Elizabeth H. Trimble
Assistant United States Attorney

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 17, 1987

Breckinridge L. Willcox, U.S. Attorney for the District of Maryland, announced today that Martin Marietta Corporation had entered guilty pleas to two counts of mail fraud and one count of making a false statement to the United States Defense Department. The please [sic] were entered to charges contained in an Information filed before Federal District Judge Joseph Young today.

Martin Marietta Corporation, which has its corporate headquarters in Bethesda, Maryland, is one of the nation's largest defense contractors.

"This case represents another example of the Department of Justice efforts in the area of Defense procurement fraud. The Attorney General has made defense procurement its highest priority in while collar criminal prosecutions", said Victoria Toensing, Deputy Assistant Attorney General, Criminal Division.

The case was screened by the Defense Procurement Unit of the Fraud Section.

Mr. Willcox stated that the mail fraud scheme to which the company plead guilty arose out of an effort by the company to establish a relationship with a travel agency that would allow Martin Marietta to retain rebates from government-sponsored travel, rather than credit such commissions back to the government as required by applicable Department of Defense regulations.

According to the Government's Statement of Facts filed with the Information, Martin Marietta and a Chicago-based

travel agency, IVI Travel, Inc., entered into a complicated arrangement with subsidiary companies that allowed Martin Marietta to retain travel rebates offered by IVI. An internal memorandum delivered to a Martin Marietta Vice-President described the travel agency arrangement as "very imaginative in getting around the rebate restrictions." It was the position of Martin Marietta that these monies were initially intended to be earned by the newly-established Martin Marietta subsidiary by preforming services for the travel agency. By its guilty pleas, the company admitted that for a period of time, from October, 1983 until October 1984, Martin Marietta received the money without regard to services performed by its subsidiary. By October, 1984, the amount of rebates credited to Martin Marietta exceeded $1.8 million. Approximately 75% of Martin Marietta's travel was incurred on government-sponsored contracts. Mr. Willcox stated that Martin Marietta has agreed to repay to the United States the sum of $4.3 million, which represents the entirety of the travel rebate commissions earned by the IVI subsidiary on Martin Marietta travel.

According to the Statement of Facts, employees of Martin Marietta's travel subsidiary carried out the scheme to defraud the United States by creating, in the Summer of 1984, false documents in an attempt to show that the rebate monies had been earned. Following public disclosure of the Martin Marietta travel arrangement, in October 1984, representatives of DCAA met with three Martin Marietta vice presidents. At this meeting Martin Marietta provided information to DCAA that was later deemed to be "incomplete," according to the Statement of Facts.

The false statement count covers Martin Marietta's claim to the Department of Defense for overhead expenses for 1983 which failed to credit the government for monies received through this scheme.

Under the terms of a plea bargain agreement, the United

States Attorney's Office will recommend that the maximum penalty of $1,000 on each mail fraud count and $10,000 on the false statement count be imposed on Martin Marietta. The company has agreed to pay the United States $250,000 as reimbursement for the costs of the criminal investigation.

Mr. Willcox said that a guilty plea by the company was particularly appropriate in this case. "The evidence in this case revealed that a series of high-level Martin Marietta executives had involvement in various portions of this scheme at different times. It is fully appropriate for a corporation to be held accountable for the activities of its employees, especially when senior management either had reason to question certain activities, or failed to supervise, or both."

The investigation was conducted by Special Agents of the Defense Criminal Investigative Service, and was presented to the Grand Jury by Assistant U.S. Attorney Elizabeth H. Trimble.

Breckinridge L. Willcox indicated that the investigation is continuing and stated "additional indictments are a distinct possibility."